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August 13, 2004

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

*Appeal*

Name of Case: Worker Appeal

Date of Filing: May 7, 2004

Case No.: TIA-0096

XXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the worker's illness was not related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

*I. Background*

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE. 1/

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the

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1/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; [www.dol.gov/esa](http://www.dol.gov/esa).

worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals review certain OWA decisions. An applicant may appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

## B. Factual Background

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from 1954 through 1990, the worker was a stockkeeper, laborer, materials handler and assemblyman at the DOE's Oak Ridge, Tennessee site. According to the applicant, these jobs all involved working with toxic substances. The applicant claims that the worker developed malignant lymphoma as a result of his exposure to radiation and toxic chemicals at the work site.

The Physician Panel rendered a negative determination this claim. The Panel unanimously found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was

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2/ See [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy).

at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the claim, the Panel found that the worker did have malignant lymphoma. However, Physician Panel noted that the record showed no evidence of any "acute exposures to toxic chemicals or physical agents during the work history provided." The Physician Panel further noted that dosimetry information on the worker showed very low exposures to radiation. In particular, the Physician Panel noted that the worker's documented radiation exposure does not rise to a level that would explain his disease.

The OWA accepted the Physician Panel's determination. See OWA May 3, 2004 Letter. The applicant filed the instant appeal.

## II. Analysis

In her appeal, the applicant maintains that the worker was exposed to chemicals and other hazardous materials and argues that these exposures caused his lymphoma. However, she points to no evidence in the record to support her assertion. This contention in and of itself does not establish Panel error. The Panel found that there was no evidence of exposures in the record, and I see none. I therefore find no Panel error on the issue of whether the worker was exposed to toxic material at the DOE site. 3/

In its determination, the Panel stated that the worker smoked one and one-half packs of cigarettes per day for 10 years. The applicant responds to this by alleging that the worker had stopped smoking 38 years before his death, and claims that tobacco use could therefore not be the cause of his disease. Even if the applicant's assertion is true, it would not change the result in this case. The Panel did not determine that the lymphoma was related to smoking.

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3/ In fact, in her appeal, the applicant seems to recognize that the record contains no evidence showing that the worker was exposed to toxic material at the DOE work site. The applicant maintains that she will seek hospital medical records to corroborate her claim that the worker was exposed to toxic substances at the work site. If she does obtain that information, she may certainly request that the OWA reopen the application.

It simply noted his smoking habit. I therefore see no Panel error on this point.

The applicant also maintains that the Panel failed to consider the worker's exposure to beryllium. The applicant points to no evidence in the record establishing that the worker was exposed to beryllium. Further, the applicant did not claim that the worker had beryllium disease. Accordingly, there is no Panel error with regard to exposure to beryllium.

In sum, the applicant has not demonstrated any error in the Panel's determination. Consequently, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0096 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: August 13, 2004